JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

Dato' Zamzuri bin Ghaffar v BIMB Trust Ltd & Ors

HIGH COURT (LABUAN) — NO L22–06 OF 2007
DAVID WONG J
14 JUNE 2010

Contract — Misrepresentation — Representation by defendant's consultant to plaintiff — Reliance on representation — Whether plaintiff made payments based on representation made by defendants — Whether defendant owed duty of care to plaintiff on representation made by its consultants

The first defendant is a member of Bank Islam Group of Companies and a subsidiary of Bank Islam Malaysia Bhd. The second and third defendants acted on behalf of the first defendant (PW1 and PW2 were the representatives and financial consultants of the first defendant). The plaintiff argued that the second and third defendants on behalf of the first defendant had proposed and made representation to him, inter alia: (i) that the first defendant is a member of Bank Islam Group of Companies and a subsidiary of Bank Islam of Malaysia Bhd; (ii) that the first defendant had the necessary resources and facilities to help the plaintiff to incorporate and manage an offshore company for a fee; (iii) that the plaintiff could take part in programs offered by the first defendant exclusively and the first defendant would be able to source credit facilities through financial institutions overseas upon a minimal initial sum being invested by the first defendant; (iv) that the plaintiff must appoint and allow the first defendant's business associate and consultant, Buckingham Consultant League Sdn Bhd ('Buckingham Consultant') whose represented by one Vincent Wong to source and secure credit facilities; (v) that Buckingham Consultant is an associate of the first defendant. Subsequently, the plaintiff had incorporated an offshore company with the first defendant and appointed Buckingham Consultant to source and secure overseas financiers to provide credit facilities for the plaintiff. The plaintiff upon filling up the appropriate forms prepared and given by the second and third defendants to made several payments to the first defendant and Buckingham Consultant. However, the plaintiff did not get his credit facilities as the program to source credit facilities by Buckingham Consultant was found to be a scam. A report was made against Buckingham and Vincent Wong. The defendants argued that some of the monies were paid by the plaintiff after the plaintiff had a meeting with Vincent Wong. Hence, monies paid by the plaintiff were not made due to the defendants' representations but that of Vincent Wong. It was argued that the first defendant was never in the business of financing and had orally told the plaintiff that the program to source credit facilities was not of the first

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

defendant's thus, the plaintiff should have checked the viability of the program to source credit facility offered by Buckingham Consultants.

Held, allowing the plaintiff's claim against the defendants jointly and severally:

(1) The reliance upon the relationship between the plaintiff and the first defendant should not be looked only from what was stated in the corporate profile. Consideration should be given to the conducts of the parties when, inter alia, that in one of the meeting the second and third defendants introduced themselves to the plaintiff as the principal officer and client relationship manager respectively of the first defendant; that the second and third defendant took an active role in the processing of the offshore facility for the plaintiff. Hence, a reasonable conclusion could be made that the plaintiff had made payments based on the representations made by the second and third defendants (see paras 20, 20(b) & 21).

(2) The plaintiff's version of Vincent Wong was more credible as the representations of Vincent Wong were not pleaded in the defence although by virtue of the procedural rule that evidence need not be pleaded but the defendants should have pleaded that it was upon the representations of Vincent Wong that the plaintiff parted with his monies. Instead the pleadings only alleged the defendants were only introducers and Buckingham Consultant owned the program to source and secure credit facilities. Hence, it was not correct to say that the plaintiff had relied on the representations of Vincent Wong when he parted with his monies (see para 25).

(3) In respect to the viability of the package provided by Buckingham Consultant — a credit facility amount which is seven times more that the deposited amount — the defendants should have investigated that such facility was legitimate and common in offshore credit facility market. The defendants had failed miserably in their most basic duty of care after holding themselves out as expert in terms of sourcing offshore loans by promoting the product of Buckingham Consultant (see para 26).

(4) The defendants had taken quite proactive steps in promoting the Buckingham Consultant's package and in the circumstances it was a reasonable inference to draw that the plaintiff was led to believe that there was no necessity on its part to investigate that the first defendant was part of the financial family conglomerate of Bank Islam (see para 36).

[Bahasa Malaysia summary

Defendan pertama adalah ahli Kumpulan Syarikat Bank Islam dan anak syarikat Bank Islam Malaysia Bhd. Defendan kedua dan ketiga bertindak bagi pihak defendan pertama (PW1 dan PW2 adalah wakil-wakil dan perunding kewangan defendan pertama). Plaintif menghujahkan bahawa defendan kedua dan ketiga bagi pihak defendan pertama telah mencadangkan dan membuat

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

representasi kepadanya, antara lain: (i) bahawa defendan pertama adalah ahli Kumpulan Syarikat Bank Islam dan anak syarikat Bank Islam Malaysia Bhd; (ii) bahawa defendan pertama mempunyai sumber dan kemudahan yang perlu untuk membantu plaintif untuk menubuhkan dan mengurus sebuah syarikat luar pesisir dengan fi; (iii) bahawa plaintif boleh mengambil bahagian dalam program yang ditawarkan oleh defendan pertama secara eksklusif dan defendan pertama boleh mendapatkan kemudahan kredit melalui institusi kewangan luar negara dengan jumlah awal minimum yang dilaburkan oleh defendan pertama; (iv) bahawa plaintif mesti melantik dan membenarkan rakan niaga dan perunding defendan pertama, Buckingham Consultant League Sdn Bhd ('Buckingham Consultant') yang diwakili oleh seorang yang bernama Vincent Wong untuk mendapatkan dan memperoleh kemudahan kredit; (v) bahawa Buckingham Consultant adalah rakan kongsi defendan pertama. Kemudian, plaintif telah menubuhkan sebuah syarikat luar pesisir dengan defendan pertama dan melantik Buckingham Consultant untuk mendapatkan dan memperoleh pembiaya luar negara untuk memberikan kemudahan kredit kepada plaintif. Plaintif selepas mengisi boring-borang yang perlu yang disediakan dan diberikan oleh defendan kedua dan ketiga membuat beberapa bayaran kepada defendan pertama dan Buckingham Consultant. Walau bagaimanapun, plaintif tidak mendapat kemudahan kreditnya kerana program untuk mendapatkan kemudahan kredit oleh Buckingham Consultant didapati suatu penipuan. Suatu laporan disediakan terhadap Buckingham dan Vincent Wong. Defendan-defendan menghujah bahawa wang yang dibayar oleh plaintif selepas plaintif mengadakan mesyuarat dengan Vincent Wong. Oleh itu wang yang dibayar oleh plaintif bukan disebabkan oleh representasi defendan-defendan tetapi oleh Vincent Wong. Ia dihujahkan bahawa defendan pertama tidak pernah berada dalam perniagaan kewangan dan telah secara lisan memberitahu plaintif bahawa program untuk mendapatkan kemudahan kredit bukan oleh defendan pertama. Oleh itu plaintif sepatutnya memeriksa kebenaran program untuk mendapatkan kemudahan kredit yang ditawarkan oleh Buckingham Consultants.

Diputuskan, membenarkan tuntutan plaintif terhadap defendan-defendan secara bersama dan berasingan:

(1) Kebergantungan pada hubungan di antara plaintif dan defendan pertama sepatutnya dilihat hanya daripada apa yang dinyatakan di dalam profil korporat. Pertimbangan seharusnya diberikan kepada tindakan-tindakan pihak-pihak apabila, antara lain, bahawa di dalam suatu mesyuarat defendan pertama dan ketiga memperkenalkan diri mereka kepada plaintif masing-masing sebagai pegawai utama dan pengurus perhubungan pelanggan defendan pertama; bahawa defendan kedua dan ketiga mengambil bahagian yang aktif dalam memproses kemudahan luar pesisir kepada plaintif. Oleh demikian, kesimpulan

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

yang munasabah boleh dibuat bahawa plaintif telah membuat bayaran berdasarkan representasi yang dibuat oleh defendan kedua dan ketiga (lihat perenggan 20, 20(b) & 21).

(2) Versi plaintif mengenai Vincent Wong adalah lebih boleh dipercayai kerana representasi mengenai Vincent Wong tidak diplidkan di dalam pembelaan walaupun berikutan aturan prosedur keterangan itu tidak perlu diplidkan tetapi defendan-defendan sepatutnya memplid bahawa disebabkan representasi Vincent Wong yang plaintif telah kehilangan wangnya. Sebaliknya pliding tersebut hanya mendakwa defendan-defendan hanyalah orang yang memperkenalkan dan Buckingham Consultant memiliki program untuk mendapatkan dan memperoleh kemudahan kredit. Oleh itu, adalah tidak benar untuk menyatakan bahawa plaintif telah menyandar atas representasi Vincent Wong apabila dia kehilangan wangnya (lihat perenggan 25).

(3) Berkaitan dengan daya maju pakej yang diberikan oleh Buckingham Consultant — suatu kemudahan kredit yang tujuh kali lebih daripada jumlah yang didepositkan — defendan-defendan sepatutnya menyiasat bahawa kemudahan tersebut adalah sah dan biasa dalam pasaran kemudahan kredit luar pesisir. Defendan-defendan telah gagal secara teruk dalam kewajipan berjaga-jaga mereka yang paling asas selepas mengakui diri mereka sebagai pakar dalam bidang mendapatkan pinjaman luar pesisir dengan mempromosikan produk Buckingham Consultant (lihat perenggan 26).

(4) Defendan-defendan telah mengambil langkah yang agak proaktif dalam mempromosi pakej Buckingham Consultant dan dalam keadaan tersebut ia adalah anggapan yang munasabah bahawa plaintif telah dipengaruhi untuk mempercayai bahawa tidak ada keperluan pada pihaknya untuk menyiasat bahawa defendan pertama adalah sebahagian daripada konglomerat keluarga kewangan Bank Islam (lihat perenggan 36).]

Notes

For cases on misrepresentation in general, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4496–4548.

Cases referred to

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC (refd)

Caparo Industries Plc v Dickman [1990] 2 AC 605, HL (refd)

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593; [2007] 1 AMR 621, FC (refd)

Foo Sam Ming v Archi Environ Partnership [2004] 1 MLJ 449, CA (refd)

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 CLJ 324, CA (refd)
Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)
Malaysian International Bankers Bhd v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam [2001] 1 MLJ 375; [2001] 1 CLJ 740, CA (refd)
Maslinda bt Ishak v Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826, CA (refd)
Mutual Life Citizens Assurance Co Ltd v Evatt [1971] AC 793 (refd)
Sim Thong Realty Sdn Bhd v Teh Kim Dar [2003] 3 MLJ 460; [2003] 3 CLJ 227, CA (refd)
Sukatno v Lee Keng See [2009] 3 MLJ 306, CA (refd)
Sutherland Shire Council v Heyman (1985) 157 CLR 424 481 (refd)
Tegas Baiduri Sdn Bhd v BIMB Trust Ltd & Ors [2011] 8 MLJ 210, HC (folld)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Yeo Tin Sang v Lim Choo Kee [1961] 1 MLJ 23 (refd)

Salehuddin Saidin (Hashim Ibrahim with him) (Salehuddin Saidin & Associates) for the plaintiff.
Md Tajuddin Md Isa (Mohd Zein Md Tajuddin with him) (Md Tajuddin & Co) for the defendants.

David Wong JC:

PROCEEDINGS

[1] The plaintiff's claim is for the sum of RM1,660,400 being an amount paid to the first defendant and Buckingham Consultant League Sdn Bhd ('Buckingham') allegedly pursuant to negligent representations made by the defendants. The defendants deny liability on the ground that they owed no duty of care to the plaintiff for whatever representations they had made on Buckingham.

BACKGROUND FACTS

[2] Sometime in May 2006, the plaintiff was introduced to the first defendant and second defendant as the principal officer and client relationship manager of the first defendant through one Muhamad Najmi Mohd Aris and his of the financial consultant Puan Rashidah bt Mohd Hussain who are PW1 and PW2 respectively. This resulted in a meeting on 16 May 2006 at the first defendant's office in Kuala Lumpur with the second and third defendants and present were also PW1 and PW2. According to the plaintiff, the second and third defendants acting on behalf of the first defendant made the following proposals and representations to him:

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

(a) That the first defendant is a member of Bank Islam Group of Companies and a subsidiary of Bank Islam Malaysia Bhd and by virtue of its position and parent company's network had access to many business contacts and associates, who are able to procure and provide many financial packages, products and facilities and investment opportunities, which are not available locally in Malaysia.

(b) That the first defendant has the necessary resources and facilities to help the plaintiff to incorporate and manage an offshore company for a fee. And this will open many business opportunities to the plaintiff as Labuan is an international offshore financial centre.

(c) That the plaintiff can take part in program offered by the first defendant exclusively to its clients on a private invitation basis only. This program is an investment and loan scheme, whereby the first defendant will be able to source credit facilities for me for an initial investment sum. It was explained to the plaintiff that credit facilities for a sum of USD5m to USD10m can be secured for the plaintiff or his companies through financial institutions overseas upon a minimum initial sum being invested.

(d) That program was only offered to offshore companies incorporated in Labuan to take advantage of all the benefits available to offshore companies.

(e) To participate in the program the plaintiff must appoint and allow the first defendant's business associate and consultant known as Buckingham Consultant League Sdn Bhd whose principal is one Vincent Wong to source and secure the credit facilities under the program.

(f) Buckingham Consultant League Sdn Bhd is an associate of the first defendant, whereby it had done many business deals and programs with the said Buckingham Consultants League Sdn Bhd.

(g) That Buckingham Consultants League Sdn Bhd has the relevant experience, expertise and resources to source and secure credit financing from overseas financial institutions or private financiers.

(h) For Buckingham Consultant League Sdn Bhd to source and secure credit facilities overseas, an initial fees of USD40,000 will be charged by it.

(i) To source and secure credit facilities of a minimum of USD5m, the plaintiff needs to pay a sum of USD350,000 as an initial upfront payment which will be deposited with the overseas financier as collateral in order for the overseas financier to make an offer of credit facilities of USD5m. Such payment is to be paid through Buckingham Consultant League Sdn Bhd.

(j) Upon payment of the above sum, an offer for credit facilities for a sum of

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

USD5m will be made within four to eight weeks from an overseas financial institution to my offshore company.

[3] Based on the above alleged representations, the plaintiff had incorporated an offshore company with the first defendant and appointed Buckingham to source and secure overseas financiers to provide credit facilities for the plaintiff. The plaintiff did this by filling in all the appropriate forms prepared and given to plaintiff by the second and third defendants. The plaintiff had also made the following payments:

(a) On 22 May 2006 a sum of RM26,600 equivalent to USD7,000 to the first defendant for the purpose of incorporating the plaintiff's offshore company — Salfordian PLC.

(b) On 22 May 2006 a sum of RM144,800 equivalent to USD40,000 to Buckingham Consultant League Sdn Bhd. This payment was handed over to the second and third defendants at the first defendant's Kuala Lumpur office.

(c) On 22 May 2006 a sum of RM1,267,000 being equivalent to USD350,000 to Buckingham Consultants League Sdn Bhd through the second and third defendants at the first defendant's Kuala Lumpur office.

(d) On the 10 November 2006 a sum of RM222,000 equivalent to USD60,000 as requested made payable to Buckingham Consultants League Sdn Bhd for the so called 'structuring fees'.

[4] It is also alleged that the plaintiff had a meeting with Mr Vincent Wong of Buckingham on 26 May 2006 at the Lobby of Nikko Hotel, Jalan Ampang, Kuala Lumpur at 5pm where the second and third defendants were also present. The purpose of the meeting was to get to know Mr Vincent Wong who acted as the consultant for the CD Program and it lasted for more than one hour.

[5] It is undisputed that the plaintiff did not get his facility of USD5m as it turned out the program was a scam in that Mr Vincent Wong had disappeared and could not be found. It also resulted in a police report made by the plaintiff against Buckingham and Vincent Wong.

[6] From the defendants' point of view, their defense is basically that first defendant was never in the business of financing and had orally told the plaintiff that the program was not of the first defendant but Buckingham which the plaintiff needs to do his own investigation.

ISSUE

[7] Having heard the evidence and the submissions from respective counsel,

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

there is basically one issue and that is whether the defendants owe a duty of care in tort to the plaintiff.

DUTY OF CARE UNDER TORT

[8] The principle on this area of the law is summarised by the authors of *Charlesworth & Percy on Negligence* (11th Ed). The learned authors at p 100 summarised as follows:

> The following principles have emerged from the foregoing:
>
> (1) The duty of care is based on either an express or implied assumption of responsibility to exercise reasonable care, when tendering advice and/or providing information;
>
> (2) The elements, which normally are essential, in order to establish the existence of such a duty, are:
>
> (a) The defendant must know that his statement will be communicated to the claimant, either as an individual or as a member of an identifiable class, especially in connection with a particular transaction or transactions of a particular kind;
>
> (b) The defendant must know that claimant will be very likely to rely upon his statement for the purpose of deciding whether or not to enter on the transaction or on a transaction of that kind;
>
> (c) In all circumstances it was reasonable for the recipient to act such advice, opinion or information;
>
> (3) Although the duty of care often arises following receipt for advice or information, such a request is not essential: it suffices that advice or information has been volunteered in circumstances where it is foreseeable that the claimant will make some financial commitment based upon its accuracy or truth;
>
> (4) The duty is not restricted to those who carry on a profession. It extends to everyone in trade or business whose occupation either involves or claims to involve the possession of competence and skill in the subject matter concerned; and
>
> (5) To enable the recipient to sue successfully, he must be able to establish the fact that he relied on the advice, opinion or information to his detriment, thereby suffering economic loss.

[9] Closer to home, Gopal Sri Ram JCA (as he then was) in *Sim Thong Realty Sdn Bhd v Teh Kim Dar* [2003] 3 MLJ 460; [2003] 3 CLJ 227 at p 240 puts it this way:

> If the misrepresentation was made negligently, the remedy of the representee lies in damages in the tort of negligence under the assumption of responsibility and reliance doctrine laid down in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

465. In such a case, the representee must plead and prove a special relationship giving rise to a duty of care as well as the other elements that go to constitute the tort of negligence. So far as the relevance of the tort in relation to pre-contractual and contractual statement is concerned, we would quote with approval the following passage from *Sinnadurai on the Law of Contract* (3rd Ed) at p 243:

> Under English Law, until the decision of the House of Lords in decision *Hedley Byrne & Co Ltd v Heller and Partners Ltd*, innocent misrepresentation included negligent misrepresentation. However since Hedley Byrne and the coming into force of the Misrepresentation Act 1967, there appears now to be a distinction between negligent misrepresentation and innocent misrepresentation. Negligent misrepresentation is generally confined to cases where a duty is imposed to take care in making statement. Such a duty may arise under a contract, where the parties stand in a fiduciary relationship: *Nocton v Lord Ashburton* [1994] AC 932 or out of a 'special relationship': Hedley Byrne. Where a special relationship exists, a negligent misstatement may not only be a breach of contractual warranty, but also an actionable tort as a breach of the duty which exists throughout pre-contractual negotiations until making of the final contract. In *Selangor United Rubber Estates Ltd v Cradock & Ors* [1965] Ch 896 the court held that where a plaintiff alleged a breach of duty arising from any given relationship, he has to specify with precision the relationship under which the duty arose: in this case it was not clear whether the plaintiff was alleging the ordinary relationship of banker and customer or some other special relationship.

[10] Steve Shim CJ (Sabah & Sarawak) in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1:

> Under English law, the general duty of care test enunciated in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 is applicable to all negligence claims, including claims for pure economic loss. Pursuant to this test, three questions have to be addressed, namely, whether the damage suffered by the plaintiff is reasonably foreseeable; whether there is a relationship of proximity between the plaintiff and defendant; and whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care.

[11] From the above, in my view I am required to ask myself three questions:

(a) Whether the defendants had assumed responsibility for what was said to the plaintiff;

(b) whether the damage suffered by the plaintiff is reasonably foreseeable;

(c) whether in the circumstances it is fair and reasonable that the defendants should owe a duty of care?

Issue 1: Whether the defendants had assumed responsibility for what was said to the plaintiff

[12] I have earlier set out the circumstances of the plaintiff's version as to

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

how the relationship between the parties had evolved. I will now evaluate the plaintiff's evidence in the light of the version of the defendants which can be found in the cross-examination of DW2 (third defendant) and DW3 (second defendant) which are these:

Q5: Please refer to your witness statement A13 and A14, I put it to you that you had not only briefed the Plaintiff about the 1st def's company profile but you have gone further by telling them as follows:

(a) That the 1st Defendant is a member of Bank Islam Group of Companies and a subsidiary of Bank Islam Malaysia Berhad and by virtue of its position and parent company's network had access to many business contacts and associates, who are able to procure and provide many financial packages, products and facilities and investment opportunities, which are not available locally in Malaysia;

A: Yes

(b) the 1st Defendant is an offshore company incorporated in and operating from Labuan. The 1st Defendant has the necessary resources and facilities to help the Plaintiff to incorporate and manage an offshore company for the Plaintiff. The 1st Defendant will charge the Plaintiff a fee for the incorporation and management of the offshore company.

A: Yes

(c) Once the Plaintiff incorporates an offshore company in Labuan, the Plaintiff will have many business opportunities open to him including possibilities of investment and credit facilities overseas.

A: No

(d) Labuan is an international offshore financial centre and with the incorporation of an offshore company in Labuan, the 1st Defendant will be able to help the Plaintiff to tap into the investment and financial opportunities available in Labuan and overseas.

A: No

(e) Upon an offshore company being incorporated by the Plaintiff in Labuan, the 1st Defendant then through its contacts and associates will source and secure credit facilities for the Plaintiff's business.

A: No

(f) The said program was a financial plan and investment opportunity offered by the 1st Defendant exclusively to its clients, which clients are procured by private invitation only. The said program is an investment and loan scheme, whereby the 1st Defendant will be able to source credit facilities for the Plaintiff for an initial investment sum.

A: No

(g) In the event the Plaintiff decides to participate in the said program and incorporate an offshore company in Labuan, credit facilities for a sum of USD5

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

million and above can be secured for the Plaintiff or the Plaintiff's companies through financial institutions overseas upon a minimum initial sum being invested.

A: No

(h) The amount of credit facilities offered would be dependent on the amount of monies that the Plaintiff is willing to invest and deposit with the overseas financier as collateral, whereby a certificate of deposit will be issued by the overseas financier.

A: No

(i) The said program was only offered to offshore companies incorporated in Labuan. This was to take advantage of there being no foreign exchange control regulations, availability of significant tax savings, preferential tax regime, exemption of stamp duties on financial instruments and no debts to equity ratio requirements for companies. In the circumstances, an offshore company in Labuan is poised to take advantage and participate in the said program.

A: No

(j) In the event the Plaintiff wishes to participate in the said program, then the Plaintiff must appoint and allow the 1st Defendant's business associate and consultant known as Buckingham Consultant League Sdn Bhd, which was said to be a locally incorporated company in Malaysia whose Principal is one Vincent Wong to source and secure the credit facilities under the said program.

A: Not necessary

(k) That the said Buckingham Consultant League Sdn Bhd is an associate of the 1st Defendant, whereby the 1st Defendant had done many business deals and programs with the said Buckingham Consultants League Sdn Bhd.

A: No

(l) That the said Buckingham Consultants League Sdn Bhd is a consultant company, which has the relevant experience, expertise and resources to source and secure credit financing from overseas financial institutions or private financiers.

A: Yes

(m) That the 1st, 2nd and 3rd Defendants have with the said Buckingham Consultants League Sdn Bhd secured various credit facilities under the said program for the 1st Defendant's other customers and clients and that Buckingham Consultant League Sdn Bhd, who is a very qualified person with prominent contacts with overseas financiers.

A: No I told the client to double check with Buckingham Consultants League Sdn Bhd

(n) In the event the Plaintiff decides to participate in the said program, the Plaintiff has to appoint Buckingham Consultant League Sdn Bhd to source and secure credit facilities overseas, whereby Buckingham Consultants League Sdn Bhd will

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

charge a fee for their services. The initial fees that will be charged by Buckingham Consultant League Sdn Bhd will be USD40,000.00.

A: Yes but they have to double check themselves

(o) Under the said program, in order to source and secure credit facilities of a minimum of USD5 million a sum of USD350,000 need to be invested as an initial upfront payment which will be deposited with the overseas financier as collateral in order for the overseas financier to make an offer of credit facilities of USD5 million. The said sum of USD350,000 shall be paid to Buckingham Consultant League Sdn Bhd for them to later pay the relevant overseas financier as identified and source by them.

A: Yes as a matter of discussion.

(p) Upon payment of the above sum, an offer for credit facilities for a sum of USD5 million will be made within 4 to 8 weeks from an overseas financial institution to the Plaintiff's offshore company.

A: No they have to check with Buckingham Consultants League Sdn Bhd

(q) The whole program is an investment program, whereby for a fraction of the cost of investment, the Plaintiff will be able to secure credit facilities many times over and above the initial sum at a favourable interest rate. These services are offered by the 1st Defendant to promote the established of offshore companies in Labuan, which the 1st Defendant will incorporate and manage.

A: No they have to check with Buckingham Consultants League Sdn Bhd

Q6: I put it to you that you never warned the Plaintiff that the product was not of the 1st Defendant product?

A: It is not our product so I disagree.

[13] From this evidence, it can be said that the defence of the defendants is two fold:

(a) the product promoted by the defendants belonged to the Buckingham and not theirs;

(b) the plaintiff had been warned by the defendants that he should 'double checked' the program offered with Buckingham.

[14] To determine whether which version is more credible I am guided by the principles expounded by Gopal Sri Ram JCA (as he then was) in *Foo Sam Ming v Archi Environ Partnership* [2004] 1 MLJ 449 on how to address the issue of how contemporaneous documentary evidence ought to be assessed against subsequent inconsistent oral evidence. His Lordship at p 453 cited with approval the judgment in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 which stated:

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

For myself, I rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial perception of the evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.

Further on His Lordship also cited with approval the decision in *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257:

And it is not to be forgotten that, in the present case, the judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the judge to have regard to the contemporary documents and to the overall possibilities. In this connection, Their Lordships wish to endorse a passage from a judgment of one of their number in *The Ocean Frost*; *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1 when he said at p 57:

Speaking from experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.

That observation is, in Their Lordship's opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence.

[15] Similarly, the Court of Appeal in *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433 at p 439; [2000] 4 CLJ 324 at p 330 held that:

In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also encumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact.

We say that this evaluation exercise is most crucial for it must be remembered that the respondents were testifying to events that happened eighteen years ago whilst the contemporaneous documents speak of matters then existing at the time such documents, were issued.

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

[16] With those principles at the forefront of my mind, I now evaluate the evidence. Counsel for the defendants contends that the defendants could not have assumed responsibility on two grounds. The first one is the first defendant's corporate profile. The second ground is the oral evidence of the second and third defendant. For the first ground, the corporate profile of the first defendant states as follows:

(a) the formation and management of company as well as providing corporate secretarial services;

(b) the setting up of Islamic trust funds;

(c) the writing and custodian services of Islamic will;

(d) administration of estate;

(e) agent for zakat calculation and payment; and

(f) provide advisory services for fara'id laws of distribution.

[17] And since there is no mention of the business of offering any advice on financial packages or business of providing and securing financing packages, the first defendant could not have assumed responsibility. On this contention, counsel relies on the case of case of *Mutual Life Citizens Assurance Co Ltd v Evatt* [1971] AC 793 where the Privy Council at p 700 held as follows:

> since the company's business did not include giving advice on investments and it did not claim to have the necessary skill and competence to give such advice and to exercise the necessary diligence to give reliable advice, its duty towards the plaintiff was merely to given him an honest answer to his inquiry and, accordingly, the facts alleged did not disclose a cause of action.

[18] For the second ground, counsel for the defendants relies on the following evidence of DW2:

> Q12. Please inform the Court what happened at the meeting in May 2006
>
> A12. During the meeting, Dr. Aimi explained to the Plaintiff, Muhamad Najmi and Pn. Rashidah about the company profile of the 1st Defendant. After Dr. Aimi had completed his presentation about the 1st Defendant's company profile, Muhamad Najmi then told me and Dr. Aimi that the Plaintiff wants to hear about offshore loans.
>
> Q13. What happened next?
>
> A13. Plaintiff then asked Muhamad Najmi to leave the room, as he doesn't want Muhamad Najmi to join the meeting. Then at the request of the Plaintiff and his introducer Pn Rashidah, I did brief them of the products available on the market that was offered by Mr. Vincent Wong of Buckingham Consultants League Sdn

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

Bhd. *However, I did warn them that the product was not of the 1st Defendant's product and that the Plaintiff should deal directly with Mr. Vincent Wong …* (Emphasis added.)

DW-2's stand in cross-examination:-

I put to you that you never warned the Plaintiff that the product was not of the 1st Defendant product? It is not our product so I disagree. (Emphasis added.)

[19] I shall now deal with the second ground first. I had in a related case, namely *Tegas Baiduri Sdn Bhd v BIMB Trust Ltd & Ors* [2011] 8 MLJ 210 — had rejected a similar contention and this is what I said:

In respect of the contention that the second and third defendants had orally made clear to the plaintiff that the Buckingham is not their product and independent investigation should be conducted by the plaintiff flies in the face of the undisputed evidence. It is not reasonable for a company such as the first defendant being part of a big conglomerate family of Bank Islam that they would not have given a written disclaimer to the plaintiff as to the Buckingham package if they are minded to give any disclaimer. With the legal resource at their disposal, any legal adviser worth his or her salt would have advised that a written disclaimer as opposed to oral disclaimer must be given. However the reality is that no such written disclaimer was given and the reason could very well be that if such disclaimer was given they would not attract any clients to the Buckingham schemes. As stated earlier the conduct of the defendants was not one of a 'post office' role. On contrary the first defendant through the actions of second and third defendants had taken a proactive role in procuring the deal for Buckingham.

[20] As for the reliance of the first corporate profile, I also reject it for the simple reason that the relationship between the plaintiff and the first defendant must not be looked at only from what is stated in the corporate profile. The conducts of the parties must be considered and they are as follows:

(a) The plaintiff sometime in May 2006 was briefed by the second and third defendants at the first defendant's office at BIMB Capital Markets, Suite 8-8, 8th Floor, Sheraton Imperial, KL of the Buckingham package.

(b) At that meeting the second and third defendants had introduced themselves as the principal officer and client relationship manager respectively of the first defendant. From the second defendant's business card, it can be seen that he is highly qualified in that he holds a PhD Islamic Trust and Wealth Management.

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

(c) The meeting can be said for the sole purpose of introducing to the plaintiff to offshore credit facility which the plaintiff requires for his business.

(d) All relevant forms for the processing of the offshore loan were given to the plaintiff after they were filled in by the third defendant.

(e) An offshore company in Labuan was incorporated with the services of the first defendant for the purpose of the offshore facility.

(f) The second and third defendants took an active role in the processing of the offshore facility and this can be seen from the text messages between the personalities in this suit:

> On 11th of February, 2007, PW1 received from the 2nd Defendant this text message:
>
> > Tuan Haji Najmi, sabar, we r working harder every day, setakat clients yang marah dan maki pun ada, apa nak buat, kita tak lari dari commitment, kata mesti dikota. Lepas ni, we are going to proceed only fund raising above USD100M saja, kalau kena marah pun berbaloi. Kalau dapat pun berbaloi, tak mau small retail clients lagi, dah serik — Aimi.

On 14th February, 2007, the plaintiff received this text message from the 3rd Defendant:

> 'Dear Vincent, our condolence to you and your family on the demise of your mother. Its unforgetful moment especially it falls on Valentine's Day. See you after Chinese New Year — (cc all clients).'

On 28th of February, 2008 at 6.09 pm, DW2 received this text message from the 2nd Defendant:

> 'Pls liase with The 3rd Defendant on Dato' Zam, sorry, not I am being not responsive but I'm currently with BNM and SEAT (South East Asia Task force on money laundering) to help the govt. in tracking money laundering activities."

On the same day, at 9.33pm, the Plaintiff received this text message from 2nd Defendant:

> 'Dato, both saya n Khariman still in Bukit Carcosa (national service), quickly to answer your query. Buckingham consultants league or leaque is the same company but registered at R.O.C. as leaque becoz staff R.O.C. masa tu ikut American English, while the actual one originated from UK,

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

> sepatutnya league tapi dah tak boleh tukar thereafter, more importantly in Bank accepts cheque to Buckingham either as leaque or league. That one is due diligence we did 2 years ago already, b4 we started with Vincent, of course we wouldn't be jeorpadising our position especially our esteem clients. Currently your case is on top priority by Vincent Wong and he is working to realize as committed and promised to you. Now 99% already in place, pls .. we really appreciate your utmost understanding and patience, tq and wassallam. cc: Khariman.'

On 1st March, 2007 at 9.03 am, the plaintiff received this text message from the 2nd Defendant.

> 'For us being dragged into this is as known quality, we will not involved on OTB, its genuine, registered offshore bank, of course not available to those not in circle. Similarly, we understand your position anger n frustration, beginilah, we also facing tremendous pressure from all angles, thus once this completed (you receive the draw down), we will not be pursuing more business. Thank you for Ybhg. Dato' Sri understanding up to now. Wassallam, cc: Khariman.'

(g) It was not disputed that PW1 would get a commission if the offshore facility had been successful which in my view gives a reasonable inference that the defendants stood to gain financially from the deal.

(h) The second and third defendants' action in ensuring that all the amounts due to Buckingham are duly paid.

(i) The existence of an agency agreement between the first defendant and Buckingham.

[21] From the totality of the evidence one can easily make a reasonable conclusion that the plaintiff had made payments based on the representations made by the second and third defendants. Accordingly I find that the defendants had assumed responsibility for what the defendants had said.

Issue 2: whether the damage suffered by the plaintiff is reasonable foreseeable

[22] The loss or damage as claimed is RM1,660,400 particulars are as follows:

(a) 22 May 2006 The sum of RM26,600 equivalent to USD7,000 paid on 22 May 2006 to the first defendant for the purpose of incorporating an offshore company in Labuan.

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

(b) The sum of RM144,800 paid on 22 May 2006 equivalent to USD40,000.

(c) The sum of RM1,267,000 paid on 22 May 2006 equivalent to USD350,000.

(d) The sum of RM222,000 paid on 10 November 2006 equivalent to USD60,000.

[23] Any reasonable person after having heard the evidence would have concluded that what had been said by the second and third defendants had led to the plaintiff to pay the above amounts. That being the case I have no hesitation in finding that the damage suffered is reasonable foreseeable.

[24] I am aware of the oral submission of counsel for the defendants that some of the monies were paid after the plaintiff had met up with Mr Vincent Wong and hence those monies which were paid were not paid due to the defendants' representations but that of Mr Vincent Wong. The preliminary issue of fact which I need to consider is when Mr Vincent Wong met the plaintiff. The plaintiff's version is that they met on 26 May 2006 at the lobby of Nikko Hotel, Jalan Ampang, KL at 5pm. The plaintiff's version is confirmed by PW3. However according to the second and third defendant, this is their evidence:

> Q21. Did the Plaintiff meet with Vincent Wong?
>
> A21. They did. It was sometime between 19th to 22nd May 2006. The meeting was attended by Plaintiff, Pn. Rashidah, Mr. Vincent Wong and myself at our former marketing office in Kuala Lumpur.
>
> Q22. What happened during this meeting?
>
> A22. During the meeting Mr Vincent Wong gave an explanation about Buckingham's product. He told the Plaintiff that Buckingham Consultant League Sdn Bhd was capable of sourcing and securing offshore credit facilities. After Mr. Vincent Wong had finished his explanation, the Plaintiff then instructed Mr. Vincent Wong to make the necessary arrangement to secure an offshore financing.
>
> Q23. What happened after this meeting?
>
> A23. A subsequent meeting was held between the Plaintiff, Pn. Rashidah, Mr. Vincent Wong, Dr. Aimi and myself at the Nikko Hotel, Kuala Lumpur.
>
> Q24. What was the purpose of the meeting in Nikko Hotel?
>
> A24. Plaintiff wanted to inquire from Mr. Vincent Wong about the status of his offshore financing. Mr. Vincent Wong told the Plaintiff that the Plaintiff's application was being processed and he will keep the Plaintiff updated of any further development.

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

Q25. Do you know if the Plaintiff and Mr Vincent Wong had further contacts after the meeting at Nikko Hotel?

A25. Yes, I believe they maintained in contact with each other.

Q26. What made you to form this believe?

A26. Because the Plaintiff will sometimes call me to ask where Vincent is. This happened when he could not get in touch with Vincent."

[25] From those evidence, it is contended by the defendants that the payment of the RM1,660,400 was due to the representations of Mr Vincent Wong and not the defendants for the simple reason that the payment was made after the meeting with Mr Vincent Wong. With respect I don't agree. First and foremost the plaintiff's version of the meeting date with Mr Vincent Wong — 26 May 2006 — is more credible for the simple reason that the representations of Mr Vincent Wong were not pleaded in the defense. I am aware of the procedural rule that evidence need not to be pleaded but in this case the defendants should have pleaded that it was upon the representations of Mr Vincent Wong that the plaintiff parted with his money. Instead the pleadings only allege that the defendants were only introducers and Buckingham owns the product. In any event the defendants had not produced any person to corroborate their version in that they could have easily called their secretary to testify on the meeting alleged. Surely any capable secretary would have recorded any appointment of meetings of the second or the third defendants as they were senior position in the first defendant. It is also not credible for the defence to say that the plaintiff had met Mr Vincent Wong several times as his subsequent disappearance had proved that this person is not an easy person to find. I also find it not credible to say that Mr Vincent Wong briefed the plaintiff on his product again as a detailed explanation had been done by the second and third defendants. Hence I am of the view that there was only one meeting between the plaintiff and Mr Vincent Wong on 26 May 2006 at the lobby of a hotel which in my view was solely for the purpose of introducing Mr Vincent Wong to the plaintiff. That being the case, it is not correct to say that the plaintiff had relied on the representations of Mr Vincent Wong when he parted with his monies.

STANDARD OF CARE

[26] I will now deal with the standard of care which the defendants are bound by. Generally speaking, the defendants are required to exercise reasonable care and skill in giving advice and what is 'reasonable' is determined by the court by taking into account what is the standard of care and skill which can be demanded from a person of similar profession of the second and third defendants. (*Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2007] 1 AMR 621). In this case there is no evidence from the plaintiff as what

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

standard should the defendants be subjected to. Be that as it may, the court is duty bound to prescribe a standard of care and in this case it is my view that when promoting a product in which one has an interest in as the defendants have in this case, the least the defendants should have done is to check on the background of the Buckingham and financial package. In this case investigation should have done on Buckingham, Mr Vincent Wong, Overseas Trust Bank Ltd and the viability of the package offered. Of course what had happened is that the Buckingham package had turned out to be a scam and the plaintiff had paid a heavy price. Overseas Trust Bank Ltd appears to be non-existent and Mr Vincent Wong has since disappeared from the face of the earth which resulted in a police report lodged by the plaintiff against him. As for the viability of the package — a credit facility amount which is seven times more than the deposited amount — the defendants should have investigated that such facility is legitimate and common in offshore credit facility market. The defendants had failed miserably in their most basic duty of care after holding themselves out as expert in terms of sourcing offshore loans by promoting the product of Buckingham.

[27] My conclusion is supported by the decision in *Malaysian International Bankers Bhd v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam* [2001] 1 MLJ 375; [2001] 1 CLJ 740 where the facts as per the report are:

> The appellant merchant banker appealed against the decision of the High Court which gave judgment in favour of the respondent. The respondent had claimed against the appellant for loss suffered as a result of investing in a company ('the company') induced by the appellant's false misrepresentations. The appellant was alleged to have falsely misrepresented that the company had a guaranteed dividend of 24%pa and that it was a respectable company with a sound financial standing. However, the said guaranteed dividend did not materialise. Further, the company was not of sound financial standing and had in fact gone into receivership. The appellant alleged that the representations were made based on information supplied by the company. Further, that the appellant's role therein was merely that of a finder to procure purchasers to buy the shares of the company.

[28] In that case counsel for the appellant had made a similar argument made here and that is the information given to the respondent there was provided by the third party/company. This argument was rejected by the Court of Appeal through the judgment of Shaik Daud Ismail JCA and this is what he said:

> In the light of the position of the appellant as merchant bankers, it is our view that they cannot be heard to say that they are merely playing the role of a finder of bumiputra purchasers of the shares of the company and that whatever information they supplied to the appellant were simply passed on from the company. It is our view that being merchant bankers, they owe a higher duty to the respondent than that of a mere finder. They certainly owe a higher burden when supplying any information from the company to the respondent. They ought to ascertain and

JOBNAME: No Job Name PAGE: 21 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

> verify all information supplied by the company before passing on to the respondent. We agree that the first representation was actually made as it is contained in the letter from Mohamad Tajuddin to Tan Sri Abdul Aziz but we cannot agree that it was not false. The representation that the directors of the company guaranteed a dividend of 24%pa for three years was indeed a false one, as found by the learned judge

Issue 3: whether in the circumstances it is fair and reasonable that the defendants should owe a duty of care?

[29] Counsel for the defendants as in the case of *Tegas Baiduri* has urged me to pay heed to the so called 'increment test' expounded by Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481 which was approved by Lord Bridge in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 618 and it is this:

> It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or reduce or limit the scope of the duty or the class of person to whom it is owed.

[30] This is what I said in that case and I see no reason to depart from it:

> I have no problem with what is stated by Brennan J but one must take into consideration that we live in a borderless economy where the financial status of a country can be changed for the worse overnight with negative commentaries by the so called experts on financial matters. Similarly the currency of a country can be attacked resulting in devastating consequence to the people of that country. That being the case, it is only reasonable that the public expect full disclosures by the so called financial advisers to their clients to be practiced so that they can make informed decisions as to their course of action. Another consideration which I need to take into account is this. Not to impose such a duty would in my view undermine the integrity and confidence of the finance industry which is the one of the driving engines of the country's economy. An undermined finance industry will damage the country image as a trusted international financial centre which is being actively promoted to the international community by the relevant authorities. Hence in this case, I have no hesitation in concluding that in the circumstances of this case, it is fair to hold that the defendants owe a duty of care of investigation as set out earlier to the plaintiff. In any event, I believe that I had not expanded a new category of negligence as all I did was to apply established principles in this area of law.

FRAUDULENT MISREPRESENTATION

[31] Counsel in his submission had not dealt with this issue and I can only guess the only reason is that the plaintiff had not been able to prove his case

JOBNAME: No Job Name PAGE: 22 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

beyond reasonable doubt as required by law (see *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301). I had dealt with this contention in the *Tegas Baiduri Sdn Bhd v BIMB Trust Ltd & Ors* [2011] 8 MLJ 210 and I adopt my reasoning there.

OTHER CONTENTIONS

Maybank Bhd had caused the loss

[32] This contention is premised on the fact that the plaintiff had paid Buckingham with HSBC Bank Malaysia Berhad and RHB Islamic Bank cheques with the name 'Buckingham Consultants 'League' Sdn Bhd, written on them and that that company does not exist in law. The entity which exists in the registry of companies is Buckingham Consultants 'Leaque' Sdn Bhd. Hence, it is submitted that it was HSBC and RHB who had caused the loss by clearing the cheques. Firstly it is not disputed that the third defendant had explained to the PW1 by a text message which for convenience I set out again:

> Dato, both saya n Khariman still in Bukit Carcosa (national service), quickly to answer your query. Buckingham consultants league or leaque is the same company but registered at R.O.C. as leaque becoz staff R.O.C. masa tu ikut American English, while the actual one originated from UK, sepatutnya league tapi dah tak boleh tukar thereafter, more importantly in Bank accepts cheque to Buckingham either as leaque or league. That one is due diligence we did 2 years ago already, b4 we started with Vincent, of course we wouldn't be jeorpadising our position especially our esteem clients. Currently your case is on top priority by Vincent Wong and he is working to realize as committed and promised to you. Now 99% already in place, pls.. we really appreciate your utmost understanding and patience, tq and wassallam. cc: Khariman.

[33] That only means that the defendants had led the plaintiff to believe that this issue is a non-issue. Furthermore the relevant cheques were handed over to the third defendant for onward transmission to Buckingham. The reality is that the relevant cheques were written up based on the representation that Buckingham is legitimate entity. Accordingly I reject this contention.

The plaintiff's contributory negligence

[34] The crux of the submission of counsel for the defendants is simply that the plaintiff should have checked on Buckingham and their products and by

JOBNAME: No Job Name PAGE: 23 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

failing to do so; they had contributed to the loss. Counsel also referred the court to the case of *Sukatno v Lee Keng See* [2009] 3 MLJ 306 at p 323 where the Court of Appeal said:

> What is required of the defendant in order to establish a plea of contributory negligence is rather easy. It is for the defendant to prove that the plaintiff did not in his own interest take reasonable care of himself and thus contributed by his own want of care to his own injury (*Nance v British Columbia Electric Railway Company*)

[35] The fact which the defendants premised their submission is that the plaintiff's admission that he had no experience on offshore financial facility and hence he should have done his own investigation.

[36] With respect this ignores the basic and primary reason why the plaintiff met up in the office of the first defendant. That reason is that the plaintiff went to the office of the first defendant on the sole premise that the defendants could help them as they held themselves as the 'people' who could help. As stated earlier the defendants had taken quite pro active steps in promoting the Buckingham package and in the circumstances it is a reasonable inference for me to draw that the plaintiff was led to believe that there is no necessity on its part to investigate bearing in mind, among other factors listed earlier, that first defendant is part of the financial family conglomerate of Bank Islam.

[37] Accordingly I reject the defendants' contention of contributory negligence.

Liability of the first defendant

[38] Though this issue was not dealt with by counsel in their submissions, out of caution I should say something about it. As discussed throughout my judgment, the second and third defendants in making the representations to the plaintiff had been acting as employees of the first defendant which in my view gives rise to the issue of whether the first defendant is vicariously liable for the negligent acts of the second and third defendants. This issue was discussed in the case of *Yeo Tin Sang v Lim Choo Kee* [1961] 1 MLJ 23 where the then Court of Appeal through the oral judgment of Thompson CJ said this:

> For myself I will start my consideration of this appeal by quoting the following decision from an old edition of *Bowstead on Agency* [1944 (10th Ed) p 206]: 'Where injury or loss is caused to a third person by the wrongful act … of an agent who is acting within the scope of his authority, the principal is liable jointly and severally with the agent.'

JOBNAME: No Job Name PAGE: 24 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

I accept that as a correct statement of the law.

[39] This principle of law is followed in the recent Court of Appeal decision in the case of *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826 where the court was also faced with the same issue of vicarious liability. Through the judgment of Suriyadi JCA, the Court of Appeal quoted with approval the judgments in *Dyer v Munday* (1895) (CA) where Lord Esher MR ruled:

> The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable.

Lopes LJ remarked:

> The law says that for all acts done by a servant in the conduct of his employment, and furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he gave is exceeded.

[40] From those quotations, I am required to determine whether what the second and third defendants represented to the plaintiff was in the course of their employment. In my mind there is no doubt that what the first and second defendants had done was in the course of their employment. Hence the defendants should be held to be jointly and severally liable for the plaintiff's loss.

FINAL ORDERS

[41] For all the reasons stated above I make the following orders:

(a) Judgment against the first, second and third defendants jointly and severally in the sum of RM1,660,400.

(b) Interest at the rate of 4%pa on the judgment sum from the date of writ until the date of judgment.

(c) Thereafter interest at the rate of 8%pa on the judgment sum from the date of judgment until full settlement of the same.

(d) Costs to the plaintiff to be taxed unless agreed.

[42] I have not given an order for damages to be assessed as I am of the view that the only foreseeable loss which the plaintiff had suffered is the sum of

JOBNAME: No Job Name PAGE: 25 SESS: 1 OUTPUT: Thu May 12 15:23:05 2011
//caseml/case/mlj/2011_008_mlj_185

RM1,660,400. In any event there is no evidence before me to show there is any other loss which I could conclude that they are foreseeable.

Plaintiff's claim against defendants allowed jointly and severally.

Reported by Mashrifah Ravendran